IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

Chapter VIII, Rule 32(2) (b)

Description of case

Criminal Appeal No. 421/ 2001

Date of decision: 11.10.2004

For the approval of:-

Hon'ble Mr. Justice Irshad Hussain

Hon'ble Mr. Justice J.C.S. Rawat

-Whether the order/judgment should be sent to the reporters for reporting?

(Yes)

-Whether the reporters be allowed to see the judgment?

(Yes)

Dated:- 11.10.2004
LSR

IN THE HIGH COURT OF UTTARANCHAL
AT NAINITAL

Criminal Appeal No.2259/1998-old no.

421/2001-new number

Heera Singh S/o Pyara Singh,
R/o Lalpur Police Station Kichchha,
Rajaswa District Udham Singh Nagar.

Appellant.

Versus

State of Uttaranchal ..... Opposite Party.

Mr. Rajendra Kautiyal Learned counsel for the appellant.
Mr. Amit Bhatt Learned A.G.A. for the State.

Coram: **Hon'ble Irshad Hussain J.**
Hon'ble J.C.S. Rawat J.

Date of Delivery: - OCTOBER 11, 2004

(DELIVERED BY HON'BLE J.C.S. RAWAT J)

1. This is a criminal appeal preferred by the appellant Heera Singh against the judgment and order dated 05-09-1988 passed by Sri O.N. Khandelwal, the then Sessions Judge, Nainital in S.T. No. 391 of 1994 State Vs. Heera Singh convicting and sentencing the appellant u/s 302 I.P.C. for imprisonment for life and a fine of Rs. 5,000/- for committing the murder of Mohan Lal in the night between 18 and 19-08-1994 near Indira chowk, Kichchha, P.S. Kichchha, district Udham Singh Nagar. In default of payment of fine the appellant was ordered to undergo six months imprisonment.

2. The facts, in nut shell, are that Ranjeet Singh

Bhakuni (PW-1) received information from the shepherds of village Govind Nagar, Deoriya, P.S. Kichchha that a dead body of a boy was lying on the bank of Beni River in village Lal Pur, Deoriya. Ranjeet Singh Bhakuni (PW-1) informed the police of P.S. Kichchha on telephone at 10:00 a.m. on 19-08-1994. The entry of this telephonic information was made in G.D. no. 22 at 10:00 a.m. (Ex.Ka.-4) by Head Moharrir Ved Prakash Sharma. On this information S.I. Bhudeo Saraswat (PW-7) went to the place where the dead body was alleged to be lying. He prepared Panchayatnama (Ex.Ka-5) and sealed the dead body and also prepared form no.13 (Ex.Ka-6), photo lash (Ex.Ka-7), letter (Ex.Ka-8) and sample of seal (Ex.Ka-9). S.I. Bhudeo Saraswat (PW-7) also prepared recovery memo (Ex.Ka-10) regarding collecting simples of simple earth the blood stained earth.

3. The dead body of the deceased was sent in sealed Cover for post mortem through constables Vidya Sagar (PW-5) and constable Ram Chandra. The post mortem on the dead body of deceased Mohan Lal was conducted by Dr. Shalender Kumar (PW-6) Medical Officer, S.S. Jeena Base Hospital, Haldwani, Nainital on 19-08-1994 at 5:00 p.m. the doctor prepared post mortem report (Ex.Ka-3). The following ante mortem injuries were found on the dead body of the deceased:

1. Stab wound, 2 cm. x 1 cm. just over left side of the supra-sterunal notch, wound is 6 cm. deep, blood present.

2. Stab wound just below the right lower eye lid 2 cm. x 1 cm. in sized 2 cm. deep clotted blood present, eye ball absent.

3. Stab wound 3 cm. x 2 cm. in size on the side of abdomen, which is also cut 4 cm. in feriolateral to umbilicus. Intestine protruded out from the wound.

4. Abrasion over right side of face in an area of 4 cm. x 4 cm.

The death was caused due to shock and hemorrhage as a result of ante mortem injuries.

4. S.I. Bhudeo Saraswat (PW-7) deposited the sealed Bundles at the police station at 2:00 p.m. vide G.D. entry no. 34. The investigation of the case was taken over by S.H.O. Radha Krishan. On 24-08-1994 at 11:10 a.m. the Investigating officer arrested the appellant near petrol pump and on the pointing out of the appellant a blood stained “CHHURI” was recovered from the bushes and recovery memo (Ex. Ka-1) was prepared and was sealed on the spot. The sealed bundle was deposited at the police station on the same day at 1:05 p.m. and an entry was made in G.D. no. 26 (Ex. Ka-13). The Investigating Officer prepared site plan (Ex.Ka-14) of the place from where the dead body was recovered and also prepared site plan (Ex.Ka-15) of the place from where the “CHHURI” was recovered. After completing the investigation charge sheet (Ex. Ka-16) was submitted against the appellant.

5. The appellant was charged u/s 302 I.P.C. for

committing the murder of Mohan Lal and u/s 201 I.P.C. The appellant denied the charges and claimed to be tried.

6. The prosecution in support of its case examined before the trial court 7 witnesses. PW-1 Ranjeet Singh Bhakuni informed the police on telephone that a dead body of a boy was lying on the bank of Beni river. PW-2 Km. Kunti is the sister of the deceased. PW-3 Harcharan is the father of the deceased. PW-4 Singara Singh was declared hostile by the prosecution. PW-5 Constable Vidya Sagar is the witness of panchayatnama and brought the dead body to the mortuary alongwith Constable Ram Chandra and is also the witness of arrest of the appellant and recovery of “CHHURI’. PW-6 Dr. Shalender Kumar conducted the post mortem on the dead body of the deceased and proved post mortem report (Ex.Ka-3). PW-7 S.I. Bhudeo Saraswat proved Ex. Ka-1 to Ex.Ka-16 and is the witness of recovery of dead body. He arrested the appellant and is also a witness of the recovery of “CHHURI’’.

7. The appellant in his statement u/s 313 Cr.P.C. denied the prosecution allegations and has been falsely implicated in this case due to enmity. The appellant submitted that the police arrested him from his house.

8. The learned trial court after appreciating the entire evidence on record found the appellant guilty u/s 302 I.P.C. for causing the death of Mohan Lal and convicted and sentence the appellant as above. The trial court acquitted the appellant for the offence punishable u/s 201 I.P.C.

9. We have heard the learned counsel for the parties

and perused the evidence on record.

10. At the outset it need to be mentioned that it is not disputed that the deceased Mohan Lal met homicidal death on account of the injuries sustained by him on the date of occurrence. PW-6 Dr. Shalendra Kumar who conducted the autopsy on the dead body of the deceased on 19-08-1994 at 05:00 p.m. opined that the death was caused due to shock and haemorrhage resulting from ante mortem injuries. PW-6 further opined that the death of the deceased was caused in the intervening night of 18/19-08-1994 by sharp edged weapon. The post mortem report (Ex-Ka.3) is on record. Thus, the said report clearly indicates that death was homicidal.

11. Now, we have to consider whether the appellant Heera Singh was responsible for the injuries sustained by Mohan Lal deceased. There was no eye witness of the occurrence. At the outset it may be mentioned here that the prosecution case rests upon circumstantial evidence. The law, which is fairly settled about circumstantial evidence is that, it would be such as to point out only to the guilt of the accused and the evidence should exclude all other hypothesis except the guilt of the accused. It is often said that though witnesses may lie, circumstances will not but at the same time it must cautiously be scrutinized to see the incriminating circumstances are such as to lead only to a hypothesis of guilt and reasonably exclude every possibility of innocence of the accused. In order to sustain conviction on circumstantial evidence, each of the incriminating piece of circumstantial evidence

should be proved by cogent and reliable evidence and the court should be satisfied that the piece of evidence taken together forge such a chain wherefrom no interference other that the guilt can be drawn.

12. Keeping in view the above principle of law we will consider the circumstances projected by the prosecution against the appellant. The first circumstance relied upon by the prosecution is that the appellant and the deceased Mohan Lal were last seen by Km. Kunti (PW-2) who is the sister of the deceased in the evening at about 06:00 p.m. when she was grazing her goats near village Deoriya. She has stated in her evidence that her brother used to ply the rickshaw. When she saw her brother deceased Mohan Lal going towards Lalpur Bagwara with Heera Singh appellant on the rickshaw. Thereafter she did not see her brother alive. When her brother did not come back to the house in the evening she told her father about this. The prosecution also adduced the evidence of Singara Singh (PW-4) who did not corroborate the fact that he saw the appellant with the deceased on 18-08-1994 at about 6:30 p.m. as such he did not support the prosecution and he denied the fact that he went to the house of his brother on 18-08-1994 at about 06:30 p.m. and he also denied the fact that he saw the deceased Mohan Lal going with the appellant towards Lalpur village. He was declared hostile. Thus, the evidence of Singara Singh (PW-4) does not support the prosecution case.

13. Now, it has to be seen whether the evidence of ‘last seen’ of Km. Kunti (PW-2) is believable or not.

The father of the deceased was informed by PW-2 Kunti that she saw her brother going to village Lalpur with the appellant on rickshaw at about 06:00 p.m. When her brother did not come back to the house she told her father as stated above. It is pertinent to mention here that no. F.I.R. was lodged by the father or sister or any other person from the side of the complainant regarding the missing of the deceased Mohan Lal or with regard to murder of the deceased. This fact itself casts a shadow on the prosecution story. PW-2 Km. Kunti and Har Charan (PW-3) stated in their evidence that there was a quarrel in between the appellant and Mohan Lal deceased. The appellant was beaten by hockey by his son and some other Sardars near the house of the deceased. PW-3 Har Charan has further stated that few days ago he went to Lalpur village of the appellant and the appellant tried to manhandle him and he escaped from there. Meaning thereby the prosecution itself alleged that there was some enmity in between the deceased and the appellant. If there was any enmity between the deceased and the appellant we wonder as to how the deceased went to Lalpur with the appellant. The prosecution version did not inspire confidence. This is apart from the fact that Kunti PW2 has not even stated regarding exact date when she was the deceased going with the appellant. She has only stated that the deceased Mohan Lal was going with the appellant one year two months ago from the date of evidence of PW2 Kunti recorded by the learned trial court. The independent witness Singhara Singh (PW4) had not corroborated the evidence of PW2

Kunti. He was declared hostile. Thus the evidence of ‘last seen’ of the deceased with the appellant does not inspire confidence and the evidence is not credible and cogent.

14. The other circumstance relied upon by the Prosecution to prove the guilt against the appellant is the recovery of knife (Chhoorie) by which the appellant committed the murder of the deceased. Section 27 of the Indian Evidence Act is an exception to the general rule that a statement made before the police is not admissible in evidence. The following are the requirements or conditions for application of Section 27 of the Indian Evidence Act:-

(i) The fact must have been discovered in consequence of the information received from the accused.

(ii) The person giving the information must be accused of an offence.

(iii) He must be in custody of a police officer.

(iv) Only that portion of the information, which relates strictly, to discover can be proved. The rest is irrelevant.

(v) The discovery of fact must relate to the commission of some crime.

(vi) Before the statement is proved somebody must depose that some article were discovered in consequence of the information received from the accused.

15. The appellant was arrested on 24.08 94 at about 10.00 a.m. and made a disclosure statement inconsequence thereof a knife (Chhoorie) was

recovered from the bushes near the place of incident from where the dead body of the deceased was recovered. The learned Sessions Judge has treated this to be a statement U/s 27 of the Evidence Act and has also acted upon the same. At the first place the recovery was made in presence of the police officer and P.W.3 Har Charan, father of the deceased and one Ramesh Singh. A memorandum of the disclosure statement has to be prepared and then the accused has to be taken to the earlier stated place in the statement and discovered any article, place or fact. It is then alone that a statement made by the accused while in police custody only to the extent that leads to a discovery of some article. No independent witnesses were taken while the punchayatnama of arrest and memo of discovery was prepared. Only the father of the deceased and one Ramesh Singh were taken as witnesses of the discovery. For the reasons best known to the prosecution the so called Ramesh Singh independent witness has not been examined at all. We are not impressed upon by the so called discovery which was tired to be proved by S.I. Bhudeo Saraswat P.W.7 and P.W.3 Har Charan. S.H.O. Radhakrishna was also not produced to prove the said discovery. The discovery appears to have been made from the open place in the field near by the place where the dead body was lying which would immediately put us on a guard against the acceptance of the discovery. Site plan Ex. Ka. 15 also reveal that there is a river adjacent to the field from where the discovery was made. If the appellant would have committed the

murder of the deceased, it would have been safe to the appellant to throw the said knife (Chhoorie) in the river instead of concealing it in the bush. Hon'ble Supreme Court in the case of **Harijit Singh and others versus State of Punjab, 2002 Supreme Court Cases (Cri) 1518** has held as under:-

> "We have noted that these memoranda have been signed only by two police officers Faqir Chand and Virsa Singh. It is unbelievable that all the accused persons who have alleged to use their firearms/weapons kept all the arms concealed in an open file in a gunny bag under a heap of straw. In the absence of independent witnesses and the alleged place of concealment being accessible to the public, the evidence of disclosure statement and the consequent recovery of arms and weapons do not at all inspire confidence. In any case, it is not a piece of evidence which would be relied on by the trial court to convict the accused by treating it as eyewitness account."

Thus the evidence of the discovery does not inspire confidence and is not credible and cogent.

16. The learned counsel for the defence contended that the father or sister of the deceased had not reported the matter to the police and no FIR was lodged by the complainant party. A cryptic report on telephone was received from (P.W.1) Ranjeet Singh Bhakuni that a dead body of a boy was lying on the bank of Beni river in village Lalpur. On this information S.I. Bhudeo Saraswat went to the place where the dead body was lying. He prepared the panchayatnama and

sent the dead body for post mortem and the post mortem was conducted on the same day at about 5.00 p.m. and the dead body was disposed of. The FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstances in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eye witnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. In the present case on the basis of information received on telephone from Ranjeet Singh Bhakuni (P.W.1) was recorded in G.D. no.22 at 10.00 a.m. on 19.08.1994. Thereafter the police went to the spot and after arrival of the police at the police station at 14 hours on 19.08.1994 and entry was made in G.D. in which a case U/s 302/201 IPC was registered. There was no written report from the side of the complainant. Then the police papers also reveal that the photo of the deceased was shown to Puran, Singada Singh, Har Charan and Rajendra Singh and they identified the dead body of Mohan Lal deceased. The police recovered the dead body in the morning and post mortem was conducted on the same day and the dead body was disposed of as unclaimed body on the

same day. The police could have waited for the disposal of the same so that the body could have been identified. The police also recorded G.D., which cast a doubt on the prosecution version. It seems that all the G.Ds. were written at the same time because G.D. dated 19.08.1994 mentions G.D. no. 22 & 34 where as G.D. dated 20.08.1994 which is of the arrival of the police party at the police station also mentions G.D. no. 34. As a matter of fact it cannot be G.D. no.34. It seems that the police has prepared the documents at one time without applying mind.

17. Har Charan (P.W.3) has stated in his evidence that on 20.08.1994 he went to the police station and he enquired about his son from the police. The police had shown him a photo of a body recovered on 19.08.94 from village Lalpur. On seeing the photograph he identified him as his son Mohan Lal. (P.W.7) Bhudeo Saraswat has stated in his evidence that on 20.08.94 he along with the Investigating Officer Radhakrishna went in connection with investigation of this case. When they reached near Lalpur crossing Rajendra Singh, Munna, Singada Singh etc. met them and the police had shown a photograph of a body recovered on 19.08.94 from Lalpur and they identified the dead body as of Mohan Lal. P.W.7 has further stated in his evidence that when the police party came back to the police station an entry was made in G.D. no. 34 at 21.30 hours on 20.08.94. Thus there is major contradiction on the point as to when the dead body of the deceased was identified. According to P.W.3 Har Charan the information was given at the

police station where as P.W.7 stated that the dead body was identified at Lalpur crossing.

18. The prosecution has also adduced the evidence with regard to the motive of the murder of deceased Mohan Lal by the appellant. The prosecution has relied on the evidence of P.W.2 Km. Kunti and Har Charan (P.W.3) who stated that there was a quarrel in between the appellant and Mohan Lal deceased. The appellant was beaten by hockey by his son and some other Sardars near the house of the deceased. This fact itself is not sufficient to prove the guilt against the appellant even if it is proved. The evidence of Har Charan (P.W.3) and Km. Kunti (P.W.2) does not inspire confidence because Har Charan has stated in his evidence that he went to Lalpur village where the appellant was residing and the appellant tried to manhandle Harcharan. He escaped from there but he has not lodged any report at the police station. If such an incident would have happened he must have reported the matter to the police. Thus, the evidence of motive does not inspire confidence and is not credible and cogent.

19. On consideration of the totality of facts, circumstances, evidence and the material on record, we are of the considered opinion that the circumstances as relied upon by the prosecution have not been established and the appellant could not have been held guilty of committing the offence with which he had been charged. The learned trial Judge erred in holding that the prosecution had established the guilt against

the appellant beyond reasonable doubt. The appeal thus succeeds and is liable to be allowed accordingly.

20. The appeal is thus allowed. The conviction and sentence awarded to the appellant per judgment dated 05.09.1998 passed by the Sessions Judge, Nainital, are set aside. The appellant is acquitted of the charge levelled against him under section 302 IPC. The appellant is on bail. He need not surrender. His bail bonds are cancelled and sureties are discharged.

21. Let the lower court record be sent back to the court concerned for compliance. Compliance report be submitted within two months.

(J. C. S. Rawat J.) **(Irshad Hussain J)**

OCTOBER 11, 2004